A

Mohamad Izzaini bin Zainudin v Public Prosecutor

B

HIGH COURT (PULAU PINANG) — CRIMINAL APPEAL NOS PA-42H-25–11 OF 2017, PA-42H-26–11 OF 2017 AND PA-424–27–11 OF 2017
ABDUL WAHAB JC
24 JULY 2018

C

Criminal Procedure — Appeal — Appeal against sentence — Appellant charged under s 377E of the Penal Code — Appellant convicted and sentenced to seven years imprisonment and one whipping for each charge and to run consecutively — Whether sentence imposed manifestly excessive — Whether sentences should run concurrently or consecutively

D

The appellant was the stepfather to the victim ('PW3'), an eight-year-old child at the time of incident. During all three incidents, the appellant ordered PW3 to suck and hold his penis and eventually ejaculated. At the third incident, the appellant took action in inserting his penis into PW3's vagina. PW3 did not inform anyone of the said incidents for fear. During school, PW3 told her friends about her experience after being taught about the act of unwanted touch in the subject of health education and they told her to inform Cikgu Hasmila ('PW4') who was the school counsellor and was also in charge of the subject in her class. PW4 proceeded to call PW3's mother after being told of the appellant's action against PW3. Her mother as well as PW4 then brought PW3 to the hospital. The doctor in charge of the Emergency Department of Kepala Batas Hospital ('PW5') called the Kepala Batas police station to inform about the said incident before carrying out physical examination on PW3. PW5 proceeded to refer PW3 for further examination by a midwife and gynaecologist ('PW6'). The result of the examination by PW6 did not show any tear on the PW3's hymen. The appellant was found guilty and convicted of three charges which were framed under s 377E of the Penal Code ('PC') by the sessions court judge ('SCJ') and was sentenced to imprisonment of seven years and one stroke of whipping for each charge and each sentence to run consecutively. Dissatisfied with the SCJ's decision, the appellant appealed against the sentence imposed by the SCJ contending that his overall sentence was manifestly excessive and that the sentences should run concurrently instead of consecutively.

E

F

G

H

I

Held, dismissing the appeal and affirming the decision of the SCJ:

(1) Offences committed by the appellant was a very serious offence and thus the SCJ in complying with the principles of sentencing was right in

concluding that deterrent sentences ought to be imposed in such cases in view of the seriousness of the offence with the element of public interest being the paramount consideration which should supersede the interest of the appellant. The SCJ had correctly directed her mind on those propositions and that the law was framed with a view to protect the public from being a victim to sexual offenders such as the appellant (see paras 28 & 31).

(2) The SCJ had placed sufficient consideration on the mitigating factors advanced by the appellant and the aggravating factors submitted by the respondent. An immediate deterrent sentence was punitive to the offender himself and was the appropriate way to emphasise specific deterrence on the appellant in the hope that the clang of prison gates upon being closed behind him for a long duration would also work towards rehabilitating him (see paras 32–33).

(3) The three offences were clearly not part of the same transactions as they were committed on three different occasions although they occurred in the same location and against the same victim. Not ordering consecutive imprisonment term in such a situation was to give an unwarranted discount to the appellant for multiple offences. The SCJ had also considered the one-transaction rule, the totality principle and the crushing effect in determining whether the sentences should run concurrently or consecutively. Thus, the court agreed with the SCJ that the sentence of seven years imprisonment and one stroke of whipping for each offence charged against the appellant to run consecutively (see paras 35–36).

(4) Based on the above reasons, the court found no error which rendered the sentence meted out by the SCJ to be manifestly wrong or unjust. Hence, no appellate intervention was warranted (see para 39).

[Bahasa Malaysia summary

Perayu adalah bapa tiri kepada mangsa ('PW3'), seorang kanak-kanak berusia lapan tahun pada masa kejadian. Semasa ketiga-tiga kejadian, perayu mengarahkan PW3 untuk menghisap dan memegang zakarnya dan akhirnya ejakulasi. Pada kejadian kali ketiga, perayu mengambil tindakan memasukkan zakarnya ke dalam kemaluan PW3. PW3 tidak memaklumkan mana-mana insiden tersebut kerana ketakutan. Ketika di sekolah, PW3 memberitahu rakan-rakannya tentang pengalamannya setelah diajar tentang tindakan sentuhan tidak diingini dalam subjek pelajaran kesihatan dan mereka memberitahu mangsa untuk memaklumkan kepada Cikgu Hasmila ('PW4') yang merupakan kaunselor sekolah dan juga yang bertanggungjawab terhadap subjek tersebut dalam kelas beliau. PW4 terus menghubungi ibu PW3 selepas diberitahu tentang tindakan perayu terhadap PW3. Ibu serta PW4 kemudian membawa PW3 ke hospital. Doktor yang bertanggungjawab ke atas Jabatan

Kecemasan Hospital Kepala Batas ('PW5') menelefon Balai Polis Kepala Batas untuk memaklumkan kejadian tersebut sebelum menjalankan pemeriksaan fizikal pada PW3. PW5 seterusnya merujuk PW3 untuk pemeriksaan lanjut oleh bidan dan pakar ginekologi ('PW6'). Hasil pemeriksaan oleh PW6 tidak menunjukkan sebarang koyakan pada selaput dara PW3. Perayu didapati bersalah dan disabitkan dengan tiga tuduhan yang dirangka di bawah s 377E Kanun Keseksaan oleh hakim mahkamah sesyen ('HMS') dan dihukum penjara selama tujuh tahun dan satu tuduhan sebatan untuk setiap tuduhan dan setiap hukuman dijalankan secara berturut-turut. Tidak berpuas hati dengan keputusan HMS, perayu merayu terhadap keputusan yang dikenakan oleh HMS menyatakan bahawa hukuman keseluruhan adalah melampau dan hukuman harus dijalankan secara serentak bukan secara berturut-turut.

Diputuskan, menolak rayuan dan mengesahkan keputusan HMS:

(1) Kesalahan yang dilakukan oleh perayu adalah kesalahan yang serius dan oleh itu HMS dalam mematuhi prinsip hukuman adalah betul dalam membuat kesimpulan bahawa hukuman pencegahan patut dikenakan dalam kes-kes sedemikian memandangkan keseriusan kesalahan itu dengan unsur kepentingan awam menjadi pertimbangan utama yang harus menggantikan kepentingan perayu. HMS dengan betul mengarahkan fikirannya terhadap cadangan itu dan undang-undang dirangka dengan tujuan untuk melindungi orang awam daripada menjadi mangsa kepada pesalah seksual seperti perayu (lihat perenggan 28 & 31).

(2) HMS telah memberikan pertimbangan yang mencukupi mengenai faktor-faktor pengurangan yang diajukan oleh perayu dan faktor-faktor yang memburukkan yang disampaikan oleh responden. Hukuman pencegahan segera adalah penghukuman terhadap pesalah sendiri dan merupakan cara yang sesuai untuk menekankan pencegahan khusus terhadap perayu dengan harapan bahawa setelah pinti penjara ditutup di belakangnya untuk jangka masa yang lama akan berhasil untuk memulihkannya (lihat perenggan 32–33).

(3) Ketiga-tiga kesalahan itu jelas bukan sebahagian daripada transaksi yang sama seperti dilakukan pada tiga masa yang berbeza walaupun ianya berlaku di lokasi yang sama dan terhadap mangsa yang sama. Tidak memerintahkan penjara berturut-turut dalam keadaan sedemikian adalah seperti memberi diskaun yang tidak wajar kepada perayu atas beberapa kesalahan. HMS juga telah mempertimbangkan peraturan satu transaksi, prinsip kesetaraan dan kesan penghancuran dalam menentukan sama ada hukuman harus dijalankan secara serentak atau berturut-turut. Oleh itu, mahkamah bersetuju dengan HMS bahawa hukuman penjara tujuh tahun dan satu sebatan untuk setiap kesalahan

yang dikenakan terhadap perayu untuk dijalankan berturut-turut (lihat perenggan 35–36).

(4) Berdasarkan sebab-sebab di atas, mahkamah mendapati tidak ada kesilapan yang menyebabkan hukuman yang dikeluarkan oleh HMS untuk secara nyata salah atau tidak adil. Oleh itu, tiada campur tangan rayuan dibenarkan (lihat perenggan 39).]

Notes

For cases on appeal against sentence, see 5(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 506–575.

Cases referred to

Adam bin Atan v PP [2008] MLJU 402; [2009] 1 CLJ 33; [2008] 2 MLRA 600, CA (refd)

Bachik bin Abdul Rahman v PP [2004] 2 MLJ 534; [2004] 2 CLJ 572, CA (refd)

Bhandulananda Jayatilake v PP [1982] 1 MLJ 83; [1981] 1 LNS 139, FC (folld)

Iwan Bujang Dara & Anor v PP [2017] 3 MLJ 630; [2017] 1 LNS 285, CA (refd)

Lim Guan Eng v PP [1998] 3 MLJ 14; [1998] 3 CLJ 769, CA (refd)

Mohamed Jusoh bin Abdullah and another v PP [1947] 1 MLJ 130; [1947] 1 LNS 73 (refd)

Mukesh & Another v State (NCT of Delhi) And Others (2017) 3 SCC 719, SC (refd)

PP v Ling Leh Hoe [2015] MLJU 1006; [2015] 4 CLJ 869, CA (refd)

PP v Loo Choon Fatt [1976] 2 MLJ 256; [1976] 1 LNS 102 (refd)

PP v Mohamed Danny bin Mohamed Jedi [2018] 6 MLJ 383; [2018] 5 CLJ 692; [2018] 1 LNS 50, CA (refd)

PP v Sulaiman bin Ahmad [1993] 1 MLJ 74; [1992] 3 CLJ Rep 447; [1992] 4 CLJ 2283, HC (refd)

R v Ipeelee [2012] SCC 13; [2012] 1 SLR 433, SC (refd)

Legislation referred to

Penal Code s 377E

Sexual Offences Against Children Act 2017

Ravichandran (Sc Ravi & Assoc) for the appellant.

Selva Ranjini (Nor Azura with her) (Deputy Public Prosecutor, Pulau Pinang State Legal Advisor's Office) for the respondent.

Abdul Wahab JC:

INTRODUCTION

[1] The appellant was found guilty and convicted of three charges which were framed under s 377E of the Penal Code ('the PC') by the sessions court judge ('SCJ') and he was sentenced to imprisonment of seven years and one stroke of whipping for each charge and each sentence to run consecutively.

[2] The charges against the appellants read as follows:

(a) first charge:

> Bahawa kamu pada di antara tarikh 23hb Julai 2016 hingga 3hb Ogos jam lebih kurang 1.45 petang bertempat di alamat no 31, Lorong 20, Taman Penaga, 13100 Penaga, Pulau Pinang di dalam daerah Seberang Prai Utara, di dalam negeri Pulau Pinang, telah merangsang seorang kanak-kanak bernama Dhia Qistina bt Mohd Rashid, KP:071023020054 untuk melakukan suatu perbuatan kelucahan melampau iaitu menghisap kemaluan kamu, dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 377E Kanun Keseksaan.

(b) second charge:

> Bahawa kamu pada di antara tarikh 4 Ogos 2016 jam lebih kurang 1.50 petang bertempat di alamat no 31, Lorong 20, Taman Penaga, 13100 Penaga, Pulau Pinang di dalam daerah Seberang Prai Utara, di dalam negeri Pulau Pinang, telah merangsang seorang kanak-kanak bernama Dhia Qistina bt Mohd Rashid, KP:071023020054 untuk melakukan suatu perbuatan kelucahan melampau iaitu menghisap kemaluan kamu, dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 377E Kanun Keseksaan.

(c) 3rd charge

> Bahawa kamu pada di antara tarikh 18hb Julai 2016 hingga 22hb Ogos jam lebih kurang 1.45 petang bertempat di alamat no 31, Lorong 20, Taman Penaga, 13100 Penaga, Pulau Pinang di dalam daerah Seberang Prai Utara, di dalam negeri Pulau Pinang, telah merangsang seorang kanak-kanak bernama Dhia Qistina bt Mohd Rashid, KP:071023020054 untuk melakukan suatu perbuatan kelucahan melampau iaitu menghisap kemaluan kamu, dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 377E Kanun Keseksaan.

[3] Dissatisfied with the SCJ's decision, the appellant appealed against the sentence imposed by the SCJ contending that his overall sentence was manifestly excessive and that the sentences should run concurrently instead of consecutively.

A FACTS OF THE CASE

[4] The appellant was the stepfather to the victim ('PW3'), an eight year sold child at the time of incident. During the first incident, PW3 had returned home after school morning session. Upon reaching home, PW3 put on a towel B to take a shower. At the material time, the appellant whom PW3 referred to as 'papa' had reached home and had entered the house using his own key. The appellant had then called PW3 into his room. Upon entering the room, PW3 saw the appellant sitting at the side of the bed wearing only towel. The C appellant proceeded to unwrap his towel and ordered PW3 to unwrap her towel. PW3 refused to do so but was pulled by the appellant and her towel came undone and fell. The appellant ordered PW3 to suck his penis but PW3 refused to do so. The appellant proceeded to pull PW3's head towards his penis and ordered PW3 to suck his penis. PW3 opened her mouth but did not touch D the appellant's penis. The appellant ordered PW3 to close her mouth while his penis was in her mouth. The appellant pushed PW3's head to enable his penis to enter her mouth. Subsequently, the appellant rubbed his penis using his own hands until a white slimy liquid was produced. The appellant ordered PW3 to touch the said liquid but PW3 refused to do so. The appellant then pulled E PW3's hand and ordered her to touch the said liquid causing her to touch it. The appellant then ordered PW3 to take a shower. The appellant forbade PW3 from telling anyone about the said incident. PW3 just kept silent and went straight to the shower. The appellant took a shower after PW3 did and left the house leaving PW3 at home alone.

F

[5] About a day or two after the first incident, similar incident occurred again for the second time. At around 1pm after PW3 returned home from school and about to take a shower, PW3 who was in her towel was called by the G appellant who was already in his towel at the material time. The appellant had ordered PW3 to suck his penis but PW3 refused to do so. The appellant pulled PW3's head forward until PW3 suck his penis. Subsequently, the appellant ejaculated and had ordered PW3 to touch his semen. The appellant then ordered PW3 to take a shower. PW3 did not tell anyone about the said H incident.

[6] At the third incident, the appellant had ordered PW3 to suck his penis. Having ejaculated, he ordered PW3 to touch his semen but PW3 refused to do so. The appellant took action in inserting his penis into PW3's vagina. The I appellant was lying down while PW3 was standing in front of the appellant. The appellant ordered the victim to come close to the appellant's penis. The appellant got up slightly with part of his body on the bed and part of his body off the bed. PW3 informed that the appellant's penis penetrated a little and that PW3 felt a slight pain. PW3 saw the appellant's penis at the material time.

[7] PW3 did not inform anyone of the said incidents for fear. PW3 also did not inform her mother for fear that her mother did not believe her. **A**

[8] During school, SP3 was taught about the act of unwanted touch in the subject of health education where the teacher had advised students to inform a trustworthy person should there be such incident. PW3 then told her friends Fatin and Syifa about her experience and they told her to inform Cikgu Hasmila ('PW4') who was the PW3's school counsellor and was also in charge of teaching health education in PW3's class. PW3 told PW4 of the appellant's action against her and PW4 proceeded to call PW3's mother asking PW3's mother to come to school. PW3 was then brought to the hospital by her mother as well as PW4. **B** **C**

[9] PW3 had met with PW5, the doctor in charge of the emergency department of Kepala Batas Hospital at the material time. PW5 called the Kepala Batas police station to inform about the said incident before carrying out any examination on PW3. PW5 was informed by PW3 that PW3 had experienced sexual harassment. There were three complaints made by PW3 to PW5 where PW3 was forced by the appellant to hold the appellant's penis until he had ejaculated and to insert his penis into PW3's vagina. PW5 carried physical examination on PW3 and proceeded to refer PW3 for further examination by PW6 who was a midwife and gynaecologist. The result of the examination by PW6 did not show any tear on the PW3's hymen as stated in the medical report ('P4'). **D** **E** **F**

THE PROCEEDINGS BELOW

The parties' arguments below

[10] In mitigation, the appellant pleaded for leniency of a minimum jail sentence to run concurrently on the following grounds: **G**

(a) that the appellant was 27 years of age and that he had a wife and two young children aged two and five years old as well as his stepdaughter, PW3; **H**

(b) that the appellant was self-employed and sold perfume at the market with uncertain income while his wife was a clerk with a monthly income of RM1,000; and

(c) that this was the appellant's first offence. **I**

[11] The respondent on the other hand urged the court to impose a heavy sentence based on the following:

A (a) PW3 was traumatised as a result of the appellant's criminal act in three different incidents;

(b) PW3 was only eight years old at the time of the incidents;

B (c) the appellant, as PW3's stepfather was entrusted to protect PW3 from outside offenders, but the appellant had broken the said trust and neglected his responsibility as PW3's guardian; and

(d) sexual crimes against children are becoming increasingly serious as reflected from the introduction of Sexual Offences Against Children Act C in year 2017.

[12] The respondent further sought for the sentences imposed to run consecutively to punish the appellant for his criminal act and to protect the children from inhumane people such as the appellant who treated children as D their sex objects.

The decision below

[13] The sessions court had considered the mitigating and aggravating E factors as advanced by the appellant and the respondent. The sessions court had also considered other factors including public interest, frequency of the offence, seriousness of the offence, the impact and trauma on the victim, age, background and interest of the appellant before passing the sentence.

F **[14]** The SCJ opined that the offences committed by the appellant were undeniably serious and that priorities should be placed on public interest as opposed to the appellant's interest in such situation. It is incumbent upon court to impose fair sentences in order to protect the public interest in view of the G rampancy of sexual offences such as fornication, sodomy and rape against children.

[15] The SCJ was of the opinion that the offences committed were serious — the offence under s 377E of the PC carries a mandatory imprisonment of up H to 14 years as well as whipping. The rampancy of such offence posed as a matter of great concern to the government as demonstrated through the enforcement of Sexual Offences Against Children Act in year 2017 which carries a heavier sentence than the existing provision under the PC.

I **[16]** The SCJ held that it was necessary for the sentence imposed to have a deterrent effect on the appellant as well as possible future offenders so as not to make light of the provision of the law where courts are not hesitant to impose fair sentence on the commission of such offence.

[17] The SCJ went on to state her reasons for decision as follows:

> [66] ... OKT sebagai seorang walau atas sebab apa sekali pun tidak boleh menggunakan SP3 untuk memuaskan nafsu serakahnya. Sebagai seorang bapa, sepatutnya melindungi SP3 daripada sebarang perbuatan jenayah pada setiap masa.
>
> [67] Secara langsung, perbuatan OKT terhadap SP3 telah meruntuhkan satu institusi kekeluargaan. OKT pun setakat menghancurkan hidup SP3 tetapi juga kehidupan dua orang lagi anaknya yang masih kecil. Perbuatan yang telah OKT lakukan telah memisahkan mereka dari menerima kasih saying dari sebuah keluarga yang lengkap.

[18] The SCJ then held that the individual sentences were to run consecutively on the ground that each offence charged with were separate incidents which occurred on different days and was not of the same transaction.

THE APPEAL

[19] The appellant contended that the sentence imposed by the SCJ was manifestly excessive on several grounds as follows:

(a) that the SCJ was in error for failing to give full and/or sufficient consideration to the mitigating factors raised by the appellant;

(b) that the SCJ had failed to give due consideration to the age of the appellant;

(c) that the SCJ had failed to consider the rehabilitation principle in imposing sentence against the appellant; and

(d) that the SCJ had failed to consider the appellant as a first-time offender.

[20] The respondent submitted that the SCJ's decision was unimpeachable given that there was a need for a deterrent sentence against the appellant's criminal act in view of the circumstances of the commission of the offence which involved child victim. It was the respondent's further submission that the sentence imposed by the SCJ ought not to be disturbed for the following main reasons:

(a) that the deterrent sentence was necessary to send the important message that the law does not condone the commission of such criminal act involving child victim;

(b) that the three offences charged against the appellant involved three different incidents at different times and occasions and were not a continuation of an act on the same day for all three incidents; and

(c) that the public interest demands justice for offences of such serious nature involving a child victim.

A THE LAW ON APPEAL AGAINST SENTENCE

[21] In an appeal against sentence, the initial function of the appellate court is one of review only and it is irrelevant consideration if an appellate court would have imposed a lesser sentence unless the appellant satisfies this court that the sentencing court has erred in principle and imposed a sentence which is manifestly excessive (see *Adam bin Atan v Public Prosecutor* [2008] MLJU 402; [2009] 1 CLJ 33; [2008] 2 MLRA 600).

[22] It is trite law that the appellate court will not normally interfere with a sentence judicially considered by a lower court as long as it passes sentence according to the correct principle of law unless it is manifestly excessive or manifestly inadequate or not in accordance with law (see *Public Prosecutor v Sulaiman bin Ahmad* [1993] 1 MLJ 74; [1992] 3 CLJ Rep 447; [1992] 4 CLJ 2283).

[23] The grounds upon which an appellate court may interfere with the lower court's decision on sentencing have been identified by the Court of Appeal in *Public Prosecutor v Ling Leh Hoe* [2015] MLJU 1006; [2015] 4 CLJ 869 to be as follows:

(a) the sentencing judge had made a wrong decision as to the proper factual basis for the sentencing;

(b) there had been an error on the part of the trial judge in appreciating the material facts placed before him;

(c) the sentence was wrong in principle; or

(d) the sentence imposed was manifestly excessive or inadequate.

[24] The pertinent consideration in sentencing had been well set out by Hashim Yeop A Sani J (as His Lordship then was) in the often quoted case of *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256; [1976] 1 LNS 102 as follows:

> In respect of sentencing there can be only general guidelines. No two cases can have exactly the same facts to the minutes detail. Facts do differ from case to case and ultimately each case has to be decided on its own merits. In practice sentences do differ not only from case to case but also from court to court. All things being equal these variations are inevitable if only because of the human element involved. But, of course, there must be limits to permissible variations.

[25] This same proposition was stated in the case of *Mohamed Jusoh bin Abdullah and another v Public Prosecutor* [1947] 1 MLJ 130; [1947] 1 LNS 73 where Wilan CJ stated:

> In our view no sentence can be assessed by a simple mathematical formula. Many

factors must be taken into account according to the circumstances of each individual case. In that respect we would draw attention to the matters which should be taken into account in fixing punishments as set out in *Halsbury's Laws of England* (Hailsham Ed, Vol 9) para 365:

> The court, in fixing the punishment for any particular crime, will take into consideration the nature of the offence, the circumstances in which it was committed, the degree of deliberation shown by the offender, the provocation which he has received, if the crime is one of violence, the antecedents of the prisoner up to the time of sentence, his age and character.

[26] In considering whether the sentence imposed on the appellants was manifestly excessive or otherwise, this court is mindful that public interest must always be the first and foremost consideration as emphasised by the Federal Court in the case of *Iwan Bujang Dara & Anor v Public Prosecutor* [2017] 3 MLJ 630; [2017] 1 LNS 285 (FC) as follows:

> But the court is not only concerned with the plea in mitigation in passing sentence. No matter how strong the plea in mitigation is in favour of a lenient sentence, the court's overriding consideration has always been and will always be the public interest.

[27] It is incumbent that the sentencing court to call for relevant evidence or information and explain as to why it came to impose such a sentence so that the appellate court can assess the lawfulness and appropriateness of the sentence. Such approach was taken by the Court of Appeal in the case of *Lim Guan Eng v Public Prosecutor* [1998] 3 MLJ 14; [1998] 3 CLJ 769 where it was held, among other things that:

> Suffice to say that a court should, when sentencing an accused, take into account all considerations, relevant to the case, including the gravity of the offence, the circumstances surrounding the commission of the offence, the antecedents of the accused, the deterrent effect that punishment is to have, any factor that warrants special attention either in favour or against the accused and above all the public interest. Reasons must be given for imposing a particular sentence to enable an appellate court to ensure that there has been no error in principle.

[28] Having considered the judgment of the SCJ, this court shares the view that offences committed by the appellant was a very serious offence and thus the SCJ in complying with the principles of sentencing was right in concluding that deterrent sentences ought to be imposed in such cases in view of the seriousness of the offence with the element of public interest being the paramount consideration which should supersede the interest of the appellant. It should reflect public abhorrence to this type of crime and also protection to the public at large.

[29] The offence committed by the appellant involved sexual offence

committed against a child victim which had resulted in a trauma suffered by PW3 and thus public interest demands an appropriate sentence to be imposed to punish the appellant and to deter potential offenders from committing the same offence.

[30] It follows that public interest warrants that the sentence imposed must reflect the gravity and seriousness of the offence and that it acts as a deterrent to the appellant as well as potential offenders. It is trite law that the sentence must be proportionate to both the seriousness of the offence and the degree of responsibility of the offender. The concept of proportionality was explained in the Canadian Supreme Court case of *R v Ipeelee* [2012] SCC 13; [2012] 1 SLR 433 in para 37 as follows:

> Proportionality is the sine qua non of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system ... Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principles serves a limiting or restraining function and ensures justice for the offender.

[31] I am of the considered view that the SCJ had correctly directed her mind on those proposition and that the law was framed with a view to protect the public from being a victim to sexual offenders such as the appellant. Further, a strong message should be sent to the public at large that the court view this offence with much detestation and a severe punishment should be imposed.

[32] In respect of the length of the imprisonment sentence, I am of the considered view that the SCJ had placed sufficient consideration on the mitigating factors advanced by the appellant and the aggravating factors submitted by the respondent. In this case, the gravity and the rampancy of the offence justify the imposition of the sentence by the SCJ. There were minimal mitigating factors present in respect of the appellant. His age, his family situation, the fact that he has a young child or that he is a first-time offender could not in my view assist him. The need for a deterrent sentence manifestly far outweighs the necessity to impose a lighter sentence in view of the severity of the offence committed by the appellant against PW3, a child victim.

[33] I am of the further considered view that an immediate deterrent sentence is punitive to the offender himself and is the appropriate way to emphasise specific deterrence on the appellant in the hope that the clang of prison gates upon being closed behind him for a long duration would also work towards rehabilitating him.

[34] On the matter of whether sentences should be ordered to run concurrently or consecutively, the Court of Appeal per Augustine Paul JCA, as he then was, in *Bachik bin Abdul Rahman v Public Prosecutor* [2004] 2 MLJ 534; [2004] 2 CLJ 572, explained that the court would be guided by the one transaction rule and the totality principle:

> The combined effect of ss 282 and 292 is that unless the court imposing a sentence says anything to the contrary, the sentence runs from the date on which it was passed (see *Ooi Sim Yim v Public Prosecutor* [1990] 1 MLJ 88). The exercise of the discretion to determine the date of commencement of the sentence of imprisonment is dependent on the facts and circumstances of each case. In deciding whether the terms of imprisonment should be consecutive or commence at another date the court will be guided by the one transaction rule and the totality principle. *Pursuant to the one transaction rule where two or more offences are committed in the course of a single transaction all sentences in respect of these offences should be concurrent rather than consecutive* (see *R v Saleem* (1964) Crim LR 482; *R v Walsh* (1965) Crim LR 248). For there to be one transaction four elements must be present, that is to say, proximity of time, proximity of place, continuity of action and continuity of purpose or design (see *Jayaraman & Ors v Public Prosecutor* [1979] 2 MLJ 88; *Amrita Lal Hazra v Emperor* 42 Cal 957; *Chin Choy v Public Prosecutor* [1955] 1 MLJ 236). The rule, however, is not absolute. As Yong Pung How CJ said in *Kanagasuntharam v Public Prosecutor* [1992] 1 SLR 81 at p 83:
>
> > The English courts have recognized that there are situations where *consecutive sentences are necessary to discourage the type of criminal conduct being punished*: see *R v Faulkner* (1972) 56 Cr App R 594, *R v Wheatley* (1983) 5 Cr App R (S) 417 and *R v Skinner* (1986) 8 Cr App R (S) 166. The applicability of the exception is said to depend on the facts of the case and the circumstances of the offence. It is stated in broad and general terms and although it may be criticized as vague, it is necessarily in such terms in order that the sentencer may impose an appropriate sentence in each particular case upon each particular offender at the particular time the case is heard.
>
> In explaining the totality principle His Lordship referred (at p 85) to the view of DA Thomas in *Principles of Sentencing* (2nd Ed) at pp 57–58:
>
> > The many decisions of the court in which the totality principle has been applied to explain the reduction of a cumulative sentence made up of correctly calculated individual parts suggest that the principle has two limbs. A cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the normal level of sentence for the most serious of the individual offences involved, or if its effect is to impose on the offender a 'crushing sentence' not in keeping with his record and prospects.
>
> In this regard reference is also made to *Emmins on Sentencing* (2nd Ed) p 151:
>
> > *It is well established that sentences must have regard to the total length of sentence passed, particularly where consecutive sentences have been imposed, to ensure that the sentence properly reflects the overall seriousness of the behaviour.*
>
> There will be cases properly described as crushing the hope in the offender of

reformation and a return to a desirable life but in which the offender has, by his criminal acts, forfeited any right to have his sentence reduced on that account (see *Crowley and Garner v R* (1991) 55 A Crim R 201). As O'Bryan J said in *R v Vaitos* (1981) 4 A Crim R 238 at p 301:

> I have some difficulty appreciating the concept that a richly deserved sentence, not manifestly excessive, should be disturbed because the person upon whom the sentence is imposed may feel crushed by it. It is quite true that the applicant has to face a very long term of imprisonment before he will be released and because he is a comparatively young man, many of the best years of his life will be spent in custody. However, from the community point of view, his detention for a very substantial period is necessary to protect females from his criminal behaviour.

Yong CJ said in that case that *the question of whether the sentence imposed is crushing cannot be answered mathematically by reference to the offender's age and the length of sentence to be served by the circumstances of the case.* (Emphasis added.)

[35] In the instant case, I agree with the SCJ that the three offences were clearly not part of the same transactions as they were committed on three different occasions although they occurred in the same location and against the same victim. The rationale for the one-transaction rule is that consecutive sentences are not appropriate if the various offences involve a single invasion of the same legally protected interest. Although the three offences involved an unwelcome invasion of the victim's bodily integrity, I think it would be against good sense to regard them as a single invasion of the same legally protected interest in the circumstances here. In any case, as mentioned earlier, the three offences occurred on different days and were not part of a continuum of events. Not ordering consecutive imprisonment term in such a situation is to give an unwarranted discount to the appellant for multiple offences.

[36] Having said that, I am also of the considered view that the SCJ had also considered the one-transaction rule, the totality principle and the crushing effect in determining whether the sentences should run concurrently or consecutively. As such I agree with the SCJ that the sentence of seven year imprisonment and one stroke of whipping for each offence charged against the appellant to run consecutively.

[37] Guided by the principle laid down in *Bhandulananda Jayatilake v Public Prosecutor* [1982] 1 MLJ 83; [1981] 1 LNS 139 that an appeal court will not interfere with the sentence imposed by the sentencing court if the latter had taken into account all relevant factors and applied all the correct legal principles when it decided to impose the sentence that it did. Taking into consideration the totality of the circumstances in this appeal before me, I find no valid extenuating circumstances working in favour of the Appellant.

[38] I find it worthwhile to refer to the concluding paragraph in the Court of

Appeal case of *Public Prosecutor v Mohamed Danny bin Mohamed Jedi* [2018] 6 MLJ 383; [2018] 5 CLJ 692; [2018] 1 LNS 50 where our Court of Appeal had cited the Indian Supreme Court case of *Mukesh & Another v State (NCT of Delhi) And Others* (2017) 3 SCC 719 as follows:

> 116 ... The courts are consistently faced with the situation where they are required to answer the new challenges and mould the sentence to meet those challenges. Protection of society and deterring the criminal is the avowed object of law. It is expected of the courts to operate the sentencing system as to impose such sentence which reflects the social conscience of the society. While determining sentence in heinous crimes, Judges ought to weigh its impact on the society and impose adequate sentence considering the collective conscience or society's cry for justice. While considering the imposition of appropriate punishment, courts should not only keep in view the rights of the criminal but also the rights of the victim and the society at large.

CONCLUSION

[39] For the foregoing reasons, I do not find any error which renders the sentence meted out by the SCJ to be manifestly wrong or unjust. In the upshot this court found that the decision of the SCJ was right. No appellate intervention was warranted. The appeal against sentence was accordingly dismissed and the decision of the SCJ affirmed.

Appeal dismissed and decision of SCJ affirmed.

Reported by Ahmad Ismail Illman Mohd Razali